

**RECEIVED**

APR 16 2012

**CLERK, U.S. DISTRICT COURT  
ANCHORAGE, A.K.**

H. Lee Cook, AK Bar No. 0309041  
[lee@leecooklaw.com](mailto:lee@leecooklaw.com)  
H. LEE COOK LAW, LLC.  
4207 SE Woodstock Blvd, Suite 423  
Portland, Oregon 97206  
Telephone: 503.719.4529  
Facsimile: 503.954.2512  
Attorneys for Plaintiff  
Travelers Casualty and Surety Company of America

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA  
ANCHORAGE DIVISION

TRAVELERS CASUALTY AND SURETY  
COMPANY OF AMERICA, a Connecticut  
corporation,

Plaintiff,

v.

DATUM CONSTRUCTON  
MANAGEMENT, INC., an Idaho  
corporation, DATUM PROPERTIES, LLC,  
an Idaho limited liability company, KEITH  
JONES, individually, and SHERRI M.  
JONES, individually,

Defendants.

No. *3:12-cv-00082-HRH*

COMPLAINT

(Indemnity - 28 USC §1332; Declaratory  
Judgment - 28 U.S.C. §§ 2201-2202)

For its Complaint, plaintiff Travelers Casualty and Surety Company of America

("Travelers") alleges as follows:

## **JURISDICTION**

1.1 The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332. There is complete diversity between the parties. There exists a justiciable controversy and Declaratory Judgment is permissible herein under 28 U.S.C. §§ 2201-2202.

## **VENUE**

2.1 Venue is proper in that the events or omissions giving rise to the claims asserted herein occurred in the District of Alaska.

## **PARTIES**

3.1 Plaintiff Travelers is a corporation incorporated under the laws of Connecticut and is authorized to conduct business and issue surety bonds in the state of Alaska. The defendant Datum Construction Management, Inc. ("Datum") is a corporation organized under the laws of Idaho and authorized to conduct business as a contractor in the state of Alaska. Defendant Datum Properties, LLC ("Datum Properties") is an Idaho limited liability company organized under the laws of Idaho. Defendant Keith Jones, individually, and Sherri M. Jones are residents of Idaho.

## **CLAIMS FOR RELIEF**

### **FIRST CLAIM FOR RELIEF**

#### **(Indemnity)**

4.1 Travelers posted its Performance Bond No. 105499479 on or about May 4,

2011 in the penal sum of \$7,376,145.00 ("Performance Bond") and its Payment Bond No. 105499479 on or about May 4, 2011 in the penal sum of \$7,376,145.00 ("Payment Bond") on behalf of Datum, as principal, payable unto The Kroger co. & Its Subsidiaries & Affiliates, also known as Fred Meyer Stores, Inc. ("Fred Meyer") as obligee for the project known as "Fred Meyer Store # 701-00485 – Expansion 3755 Airport Way, Fairbanks, AK 99709," (Project"). *True and accurate copies of the Payment and Performance Bonds are attached hereto at Exhibit "A."*

4.2 Fred Meyer made the unilateral determination that Datum was in Default under its Contract with Datum and terminated Datum for cause on October 25, 2011, thereafter demanding that Travelers complete the Project pursuant to the terms and obligations of the Performance Bond. Thereafter, on February 10, 2012, Fred Meyer and Travelers executed their Takeover Agreement under which, with a full reservation of rights and defenses - including without limitation, Fred Meyer's contractual or equitable right to terminate Datum and whether Travelers had or has at any material time the obligation to complete the Project under the Performance Bond, incur any fees, costs or expenses relating to or arising out of the completion of the Project or to pay any claims asserted against the Payment Bond - Travelers provided a completion contractor under a Standard Form of Completion Agreement, to complete the Project.

4.3 Claims were asserted against the Performance Bond by the Obligee Fred Meyer and against the Payment Bond by Datum's subcontractors, laborers and materialmen.

As of the date of this Complaint, Travelers has set a reserve in the amount of \$6,700,995.21 and has, as of the date of this Complaint paid Payment Bond claims in the total amount of \$2,013,000.37.

4.4 In partial consideration for posting the Bonds on behalf of Datum, defendants Datum, Datum Properties, Keith Jones and Sherri Jones, and each of them, provided a written General Indemnity Agreement (“GIA”) whereby said Defendants agreed to collateralize, reimburse and/or indemnify Travelers from and against all losses, costs, charges, attorney fees and other expenses of whatever kind or nature that Travelers shall sustain or incur in consequence of posting the Bonds. Despite demand, Defendants and each of them, have failed, refused and neglected to indemnify Travelers, comply with their obligations under the GIA, or provide collateral of any kind . *A true and accurate copy of the (redacted) GIA is attached hereto at Exhibit “B.”*

4.5 Under the terms of the GIA, Travelers is entitled to collateral security sufficient to discharge any claim or demand made against Travelers on any bond, recover its reasonable attorney fees incurred, said sum or sums to be set by the court from time to time upon application by Travelers, a constructive trust on all property of the subject Defendants and is further entitled to the following remedies:

In the event of a Default, Indemnitors assign convey, and transfer to [Travelers] all of their rights, title and interests in Property and [Travelers] shall have a right in its sole discretion to: (a) take possession of the work under any Contract and to complete said Contract, or cause, or consent to, the completion thereof; (b) immediately take possession of Indemnitors’ Property and utilize the Property for the completion of the work under the Contracts

without payment for such use; (c) assert or prosecute any right or claim in the name of any Indemnitor and to settle any such right or claim as [Travelers] sees fit; (d) execute in the name of any Indemnitor, any instruments deemed necessary or desirable by [Travelers] to: (i) provide [Travelers] with title to assets, (ii) take immediate possession of Contract funds whether earned or unearned, (iii) collect such sums as may be due Indemnitors and to endorse in the name of the Indemnitors, and (iv) collect on any negotiable instruments; (e) require any Obligee to withhold payment of Contract funds unless and until [Travelers] consents to its release; and/or (f) be subrogated to all the rights, remedies, properties, funds, securities and receivables relating to Indemnitors' Contracts or contracts and have the right to offset losses on any Contract or Bond against proceeds, funds, or property due from another Contract, Bond or contract. Further, in the event of Default and upon demand Indemnitors shall direct that all payments, monies, and properties that are due or may become due on any Contract or contract be made payable to, and/or sent directly to, Company, and shall issue whatever writing or notices as deemed necessary by [Travelers] to effectuate the default and/or termination of any Contract.  
*Exhibit "B," GIA, § 6.*

4.6 Under the terms of the GIA, Travelers is entitled to recover its reasonable attorney fees incurred, and said sum or sums shall be set by the court from time to time upon application by Travelers.

4.7 Travelers has performed all conditions precedent, conditions and obligations on its part to be performed, and has no plain, speedy or adequate remedy at law.

4.8 Travelers is entitled to judgment against Defendants and each of them, in the sum of \$6,700,995.21, or such other sum as shall be set by the court or determined by settlement, together with interest thereon from the date that Travelers is required to pay said sum or tender said sum into the court until paid.

## **SECOND CLAIM FOR RELIEF**

### **(DECLARATORY RELIEF)**

5.1 Travelers realleges the allegations contained in paragraphs 1.1 – 4.8, above.

5.2 The Obligee on the Bonds, Fred Meyer, has determined that Datum was in default under its Contract with Fred Meyer for the Project and terminated Datum for cause on October 25, 2011. Datum disputes Fred Meyers' conclusion that it was in default under the Contract and that the termination of the Contract was rightful. Fred Meyer, as herein alleged, demanded that Travelers complete the Contractual obligations of Datum. In conformance with its obligations under the Performance Bond, and with a complete reservation of all rights and defenses, Travelers commenced completion of the Contract, the ultimate cost of which remains to be determined. Additionally, although certain Payment Bond claims have been paid as of the date of this Complaint, other Payment Bond claims are either outstanding or unknown. The actual damages to be incurred by Travelers is thus unknown and incapable of calculation.

5.3 Datum and the other Defendants dispute their obligations under the GAI, to wit, their obligation to defend and indemnify Travelers, their obligation to reimburse Travelers for incurred actual loss, to provide sufficient collateral to discharge all claims, costs, fees and expensed to be incurred by Travelers, or to assign convey, and transfer to Travelers all of their rights, title and interests in any Property in which they or any of them have any interest.

5.4 Travelers is entitled to the declaration of the Court as to the rights and obligations of the parties with respect to the GAI, that the Defendants herein have the immediate obligation to defend and indemnify Travelers, to reimburse Travelers for incurred actual loss, costs, expenses and fees, to provide sufficient collateral to discharge all claims, costs, fees and expenses incurred or to be incurred by Travelers, and to assign convey, and transfer to Travelers all of their rights, title and interests in any Property in which they or any of them have any interest.

5.5 Travelers has performed all conditions, and conditions precedent, on its part to be performed and has no adequate remedy at law. Money damages, alone, are inadequate to provide Travelers to which it is entitled under the GAI.

WHEREFORE, Travelers prays for relief as follows:

1. ON ITS FIRST CLAIM FOR RELIEF:

A judgment in favor of Travelers and against Defendants, and each of them, in the sum of \$6,700,995.21, together with interest thereon from the date said amount is paid until repaid, and imposing on said Defendants a constructive trust upon all assets, and requiring that said assets be delivered to Travelers to be sold and disbursed and the proceeds thereof applied to the obligations owed to Travelers and for Travelers' recovery from said defendants, Travelers' reasonable attorney fees, costs and disbursements.

2. ON ITS SECOND CLAIM FOR RELIEF:

The Declaration of the Court that Defendants, and each of them, are presently

obligated to fully comply with their obligations under the GAI, including the Defendants' immediate obligation to defend and indemnify Travelers, to reimburse Travelers for incurred actual loss, costs, expenses and fees, to provide sufficient collateral to discharge all claims, costs, fees and expenses incurred or to be incurred by Travelers, and to assign convey, and transfer to Travelers all of their rights, title and interests in any Property in which they or any of them have any interest.

3. For such other and further relief as the court deems equitable and just.

DATED this 11<sup>th</sup> day of April, 2012.

H. LEE COOK LAW, LLC

By



H. Lee Cook, Alaska Bar No.  
0309041  
4207 SE Woodstock Blvd., Ste. 423  
Portland, OR 97206  
Telephone: 503-719-4529  
Facsimile: 503-954-2512  
[lee@leecooklaw.com](mailto:lee@leecooklaw.com)

Of Attorneys for Plaintiff Travelers  
Casualty and Surety Company of  
America



### CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing COMPLAINT on behalf of TRAVELERS CASUALTY AND SURETY CO. OF AMERICA on:

Mr. Arnold L. Wagner  
Meuleman Mollerup LLP  
755 W. Front Street, Suite 200  
Boise, ID 83702  
Email: [wagner@lawidaho.com](mailto:wagner@lawidaho.com)

by the following indicated method or methods:

  x   by **mailing** a full, true and correct copy thereof in a sealed, first-class postage-paid envelope, and addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Portland, Oregon on the date set forth below.

by causing a full, true and correct copy thereof to be **hand-delivered** to the attorney at the attorney's last-known office address listed above on the date set forth below.

by sending a full, true and correct copy thereof via **overnight courier** in a sealed, prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, on the date set forth below.

  x   by emailing a full, true and correct copy thereof to the attorney at the email address shown above, which is the last-known email address for the attorney's office, on the date set forth below.

Dated this 12<sup>th</sup> day of April, 2012.

  
\_\_\_\_\_  
H. Lee Cook, Alaska Bar No. 0309041

Attorney for Defendant Travelers Casualty and  
Surety Co. of America